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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 913

ABRAHAM L. SHUSHAN, ROBERT J. NEWMAN, NORVIN T. HARRIS, JR., HENRY J. MILLER AND HERBERT W. WAGUESPACK,

versus

UNITED STATES OF AMERICA.

PETITION OF HERBERT W. WAGUESPACK FOR A WRIT OF CERTIORARI TO THE HONORABLE THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT OF SAID PETITION FOR A WRIT OF CERTIORARI.

WARREN DOYLE,
RENE' J. WAGUESPACK,
W. J. WAGUESPACK, JR.,
Attorneys for Petitioner.

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UNITED STATES OF AMERICA.

PETITION OF HERBERT W. WAGUESPACK FOR WRIT OF CERTIORARI.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Herbert W. Waguespack, a citizen of the United States of America, domiciled in the State of Louisiana, respectfully presents this, his application for a writ of certiorari to review the final judgment of the

United States Circuit Court of Appeals for the Fifth Circuit, in the above numbered and entitled criminal case.

OPINION BELOW.

Petitioner was indicted in the United States District Court for the Eastern District of Louisiana for the crime of fraudulent use of the mails in violation of Section 215 Criminal Code, 18 U. S. C. A. 338, and was convicted and sentenced on January 2nd, 1940, to be imprisoned for thirty months on each of seven counts and to pay a fine of $1,000.00 on each of two counts in the indictment, the prison sentences to run concurrently. (Rec. Vol. 1, p. 456.)

Petitioner thereupon appealed to the United States Circuit Court of Appeals for the Fifth Circuit, and on the 18th day of January, 1941, that Court handed down its opinion affirming the judgment of conviction. (Rec. Vol. 8, p. 4801; 117 Fed. (2nd) 110.) Petitioner thereupon filed with said Circuit Court, within the delays allowed by law, his petition for a rehearing, (Rec. Vol. 8, p. 4842) which was denied on the 3rd day of March, 1941. (Rec. Vol. 8, p. 4860.) The mandate of said Circuit Court was stayed by its order for thirty days from March 3rd, 1941, to enable petitioner to apply to this Honorable Court for a writ of certiorari to review said final judgment of the United States Circuit Court of Appeals for the Fifth Circuit. (Rec. Vol. 8, p. 4862.)

STATUTE INVOLVED.

The statute under which petitioner was convicted, *(Sec. 215, Criminal Code; Title 18, U. S. C. A. 338)* reads in its pertinent provisions, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package writing, circular, pamphlet or advertisement, shall be fined not more than $1,000.00, or imprisoned not more than five years, or both". (R. S. Sec. 5480; Mar. 2, 1889, c. 393, Sec. 1, 25 Stat. 873; Mar. 4, 1909, c. 321, Sec. 215, 35 Stat. 1130).

JURISDICTION.

Jurisdiction of this Honorable Court is invoked under paragraph (a) of Section 240 of the Judicial Code as amended *(Section 347, Title 28, U. S. C. A.)*, making it com-

petent for this Court to review by certiorari any case, civil or criminal, in a Circuit Court of Appeals; and the application is made within 30 days after entry of judgment (denial of rehearing), as required by Rule XI of this Honorable Court, promulgated May 7, 1934, and in the manner required by Rule 38 of this Honorable Court.

SUMMARY STATEMENT OF MATTER INVOLVED.

The indictment (Rec. Vol. 1, p. 103) charged the defendant with devising a scheme to defraud and to obtain money by means of false pretenses and representations from the Orleans Levee District, the State of Louisiana and the people of the State. It further charged that the firm of Newman and Harris entered into a contract with the Board of Commissioners of the Orleans Levee District to undertake to refund some of its outstanding bonds so as to reduce the interest rates and charges. It was charged that the contract was obtained by bribing this petitioner and that one Charles A. Fitere was bribed to act as a spy, and that in furtherance and in consummation of the scheme, the mails were used by depositing in the mails, and sending through the mails, various letters. The fraud and false pretenses relied upon by the Government was in obtaining the contract by the bribery of Waguespack, and second, an erroneous and fraudulent calculation of the amount of the savings saved by the defendant to the Levee Board, in that the savings in interest were not discounted to their present value.

The contract provided that Newman and Harris were to pay all the expenses of the undertaking, to guarantee the

success of the refunding by forfeitable deposits of one per cent of the par value of the refunding bonds offered for sale, which deposit was to be retained by the Board as liquidated damages in the event of failure to obtain an acceptable bid, and to pay a portion of the premiums payable upon the called bonds if an acceptable bid was received but was not sufficient to fully cover said preminums, and Newman and Harris were ineligible to bid upon the bonds offered for sale. In consideration of the successful execution of the contract, Newman and Harris were to receive 25% of whatever savings and gains they might effect for the Board through the said refunding operations. (Rec. Vol. 1, p. 237; Vol 5, p. 3032.)

The contract was submitted and explained to the members of the Board, who exercised their independent and uninfluenced judgment in unanimously voting to award it. (Rec. Vol. 3, pp. 1619, 1640, 1641, 1650.)

It was executed in accordance with its terms and resulted in reducing the interest payments of the bonded indebtedness of the Board to the extent of nearly $2,000,-000.00. (Rec. Opinion, Vol. 8, p. 4817) The prosecution contended that the savings resulting from this reduction was fraudulently computed in that it was the gross savings over a period of many years and that the actual savings computed upon the present value of the amounts due upon the savings and savings which might afterwards accrue, was the proper basis upon which to compute the remuneration of Newman and Harris.

The evidence showed by the testimony of experts from all parts of the country that the present value system of

computation was unknown in the bond business, and that the fee for refunding operations was always paid upon the sale of the refunding bonds, and was not discounted to a present value because the savings were not immediately available. As to this charge, the Circuit Court of Appeals held that no false representations had been proven within the meaning of the mail fraud statute, and that while the amount received seemed by its magnitude to indicate fraud or mistake in a civil proceeding, the Court would hesitate to rest a criminal conviction for fraud on this alone. (Rec. Opinion Vol. 8, pp. 4821, 4822.)

The bribery was based upon the fact that petitioner had a contingent interest of 11-2/3% in the net profits, *if any*, that might be obtained by Newman and Harris. That interest subsequently amounted to less than 2-1/2% of the savings in interest obtained by the Board through the refunding operations, and was obtained by petitioner for valuable legal services which made valid an otherwise invalid contract. (Rec. Vol. 3, pp. 1918, 1922, 1995, 2142, 2145 and 2154; Vol. 4, pp. 2392, 2410.) He had neither the power nor authority to award or execute the contract himself. The Board had its own staff of paid attorneys (Rec. Vol. 3, p. 1643) and petitioner served as a member of the Board without pay, and owed the Board no legal professional services. His rights and obligations as a member of the Board were governed by particular statutes of the State of Louisiana and under a reasonable interpretation of those statutes he had a right to his interest in the contract. (Rec. Vol. 3, pp. 2146-2153, 2190; Vol. 4, pp. 4339, 4340.) There was no conflict of interest with the Board, but the same interest to effect as much

savings and gains as possible, and petitioner could not know whether he would make anything at all out of his contingent interest and he could not make anything unless the Board also profited.

Your petitioner made full proof that his participation in the profits of the contract was not bribery under the Louisiana Statutes, but, on the contrary, that under said statutes, he had a right to enter into and participate in the profits of the transaction.

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI ARE:

1. That the defendant's constitutional immunity from being compelled to be a witness against himself has been violated by the introduction in evidence, over his objection, of certified copies of his income tax return (made under compulsion of the penal clauses in the revenue laws) in the prosecution for an offense having no relation to the Internal Revenue Laws. This question has never been decided by the Supreme Court of the United States.

2. That the defendant's constitutional privilege of trial by jury has been violated by the empanelling of two alternate jurors, making a jury of fourteen, the alternate jurors sitting with the other twelve during the whole course of the trial, mingling and associating with them from the beginning of the trial until the Court's charge had been delivered to the jury, and then being discharged and taking no further part in finding the verdict. The Act of Congress of June 29th, 1933, C. 309, 47 Statutes,

380, violates the 6th Amendment, Article 3, Section 2, Clause 3 of the Constitution. Trial by jury means a jury of twelve, no more and no less. This question has never been decided by the Supreme Court of the United States.

3. That the defendant was deprived of his constitutional guarantee of a trial by due process of the law when the Assistant Attorney General of the United States in charge of the prosecution, for the purpose of creating prejudice against defendant, and precluding him from having a fair and impartial trial, improperly joined with the partisan public press and partisan politicians, in the midst of a political campaign, and by statements and interviews, made and given by him before the trial, and his conduct during the trial, created such a great and bitter prejudice against the accused as to preclude the possibility of his obtaining a fair and impartial trial by a fair and impartial jury, undisturbed by political prejudice and public clamor, and where a continuance until the pending election was over, and public excitement and prejudice had subsided was denied by the trial court.

4. That the obtaining of a contract, which was in itself without fraud, by bribing a public official is not an offense cognizable under the mail fraud statute, and is not such a false or fraudulent pretense or representation or such a scheme to defraud as is contemplated by and included in that statute. This question has never been settled by the Supreme Court of the United States.

5. That there is no scheme to defraud within the meaning of the Mail Fraud Statute, 18 U. S. Code, Section 338,

when the scheme is such that the ONLY MEANS by which the alleged victim could be deprived of money or property is a written contract which provided for the payment to the accused of 25% of whatever savings and gains they might THEMSELVES make, through their skill, efforts, expenditures, and financial risks, and when it is not charged that the alleged victim would have otherwise made any savings and gains at all, and there were no false representations, claims or promises, and the contract was skillfully and successfully executed in accordance with its terms and resulted in savings and gains of almost two million dollars in interest to the alleged victim. This question has never been settled by the Supreme Court of the United States.

TRANSCRIPT ANNEXED.

The record having been printed for the use of the Court below (Rule 38, paragraph 7), and the necessary copies so printed being furnished, and ten copies of the record as printed below, together with the proceedings and opinion in the Honorable Circuit Court of Appeals for the Fifth Circuit, and due certificate thereon of the Clerk of said Court, having been already filed under number .... of the docket of this Court we refer and attach to this petition the said record as though separately filed herewith.

SUPPORTING BRIEF.

Petitioner also files herewith and makes part of his application his brief in support thereof.

PRAYER.

Wherefore petitioner respectfully prays that a writ of certiorari may issue to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, to the end that this case may be reviewed and determined by this Court; and that the judgment of the said Fifth Circuit Court of Appeals may be, in due course, reversed and set aside and that judgment may be rendered in favor of petitioner, setting aside his conviction and sentence pronounced by law and discharging him forthwith; and petitioner further prays for all further and necessary orders proper in the premises, and for all such relief as the nature of the case may justify.

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